

11044291236

BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED
FEDERAL ELECTION
COMMISSION
CLERK

In the Matter of

2007 JUN 19 P 12:47

Republican Victory Committee, Inc., a/k/a)
Republican Victory 2004 Committee)
and Jody Novacek, in her official)
capacity as treasurer)
Jody Novacek, in her personal capacity)
BPO, Inc.)
BPO Advantage LP)

SENSITIVE

MUR 5472

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter arose from a complaint filed by the Republican National Committee with the Federal Election Commission, alleging that the Republican Victory Committee, Inc. a/k/a Republican Victory 2004 Committee and Jody Novacek in her official capacity as treasurer ("RVC"), Jody Novacek in her personal capacity, and BPO, Inc. and BPO Advantage LP (collectively, "BPO") violated the Federal Election Campaign Act of 1971, as amended ("the Act").¹ That complaint alleged, among other things, that the RVC, BPO and Ms. Novacek fraudulently misrepresented themselves as the Republican National Committee ("RNC") and the Republican Party when soliciting funds. See Factual and Legal Analyses for RVC, Jody Novacek and BPO (setting forth bases of reason to believe findings).

The ensuing investigation confirmed and uncovered additional evidence that the RVC, BPO and Ms. Novacek accepted more than \$50,000 in contributions as a result of phone solicitations and mailers that fraudulently misrepresented the RVC as the RNC and/or as an agent of the Republican Party. The phone solicitations and mailers, which were crafted

¹ BPO, Inc. was the equivalent of a parent company for BPO Advantage, LP. With respect to the activities that are the subject of this matter, BPO operated as a single unit. Therefore, we have addressed the BPO entities collectively in this Brief.

1 by Ms. Novacek, both explicitly stated and implied that the money was being collected on
2 behalf of the Republican Party. Ms. Novacek had previously worked on behalf of
3 Republican committees such as the RNC and, as demonstrated by her actions and statements
4 at the time, she knew that the RVC could not validly claim that the RVC was working with,
5 for or on behalf of the Republican Party. Moreover, although the recipients of the
6 solicitations contributed a significant amount of money, there is no evidence that any funds
7 were ever provided by RVC to the Republican Party, any of its local, state or national
8 committees, any other political committees, or any candidates, nor were the funds used for
9 other political activities. Therefore, in drafting and sending the solicitation scripts and
10 mailers and in communicating with the vendors who conducted the calls, Ms. Novacek, the
11 BPO entities and the RVC fraudulently misrepresented themselves as working on behalf of
12 the Republican Party.

13 Based on the results of the investigation, which are set forth and analyzed below, the
14 General Counsel is prepared to recommend that the Commission find probable cause to
15 believe that the RVC and Ms. Novacek, in her official and personal capacities, knowingly
16 and willfully violated 2 U.S.C. § 441h(b)(1); the RVC and Ms. Novasek violated 2 U.S.C.
17 § 441d(a); and BPO knowingly and willfully violated 2 U.S.C. § 441h(b)(2).

18 **II. STATEMENT OF FACTS**

19 Both RVC and BPO were created entirely by Ms. Novocek, and other than vendors
20 she was the only person ever to act on their behalf. Through these entities, Ms. Novocek
21 made fraudulent misrepresentations to fundraising vendors and to the general public stating
22 or implying that the RVC was raising money for the Republican Party and/or the RNC. In

11044291237

1 response to these fraudulent solicitations, the RVC received approximately \$75,000² in
2 contributions. Furthermore, the disclaimers added to the solicitations did not conform to the
3 Act's requirements.

4 **A. Ms. Novacek And The BPO Entities**

5 Ms. Novacek had extensive prior experience working in telemarketing fundraising for
6 political clients and specifically for Republican candidates and political committees. She had
7 made calls for political candidates and other political entities since 1982, and had even
8 worked as a contractor for the RNC, the National Republican Senatorial Committee, and
9 some state Republican parties. Deposition of Jody Novacek dated July 6, 2006 ("Dep."), at
10 21-24, 25:15-18, 43:3-44, 55:12-57:7. Ms. Novacek acknowledged that, in those activities,
11 she handled RNC scripts and direct mailers, including some solicitations, and had an
12 understanding of how the RNC handled its solicitations and phone bank calls. Dep. at 45:
13 20-25, 46:3-22, 47:1-8.

14 Ms. Novacek incorporated the RVC in Texas in early 2004. See RVC Articles of
15 Incorporation. Ms. Novacek initially requested status from the Internal Revenue Service as a
16 non-profit corporation under section 501(c)(3) of the Internal Revenue Code and later filed as
17 a 527 organization. Dep. Ex. 1 (Response to the Complaint) and Ex. 2 (RVC Form 8871). In
18 June 2004, Ms. Novacek filed a Statement of Organization with the Commission. Dep. Exs.
19 3, 4 (RVC Form 5 Statement of Organization and Amended RVC Form 5). Ms. Novacek
20 essentially was the RVC: no one else assisted her or was an employee or member of, or even

² As will be explained in greater detail in Section II.B.1., the Respondents deposited \$50,292 as a result of the solicitations made by Apex CoVantage, L.L.C. for the RVC. In addition, Apex has been holding an additional \$14,869 in contributions that were intended for the RVC that Ms. Novacek never took possession of due to the termination of the contract between Apex and the RVC. RVC also received approximately \$10,063 in credit card transactions as a result of the calls made by Advantage Direct Communications, Inc. on behalf of the RVC. These figures (\$50,292 + \$14,869 + \$10,063) when added together total the approximate figure of \$75,000 referred to throughout the Brief.

11044291238

1 a volunteer for, the RVC. Ms. Novacek described herself as the "founder" of the RVC and
2 the organization as her "brainchild." Dep. at 62:5-7. She conducted all RVC activities from
3 her home and had no other help, other than the assistance of neighbors to help take in her
4 mail or open envelopes when she was out of town. Dep. at 62:9-4:14, 65:20-66:2, 84:12-25.
5 Ms. Novacek admitted that she alone did all the work for the RVC. Dep. at 63:20-64:8.

6 Ms. Novacek also created and owned BPO, Inc. and BPO Advantage LP, and she
7 acted as president of and conducted all operations for those entities. Dep. at 41:12-15.
8 Ms. Novacek explained that they were really the same entity, created as two distinct legal
9 entities for Texas tax purposes, and that she used BPO to enter into business transactions and
10 contractual obligations on her own behalf as well as to enter into negotiations, contracts and
11 agreements on behalf of the RVC. Dep. at 18:16-23, 41:12-15, 111:11-21, 112:9-17.

12 **B. The Solicitations**

13 Ms. Novacek crafted a telemarketing fundraising campaign to solicit donations to the
14 RVC, and made all financial and contractual arrangements through BPO. While it should
15 have been obvious to the average person that they could not claim RVC was operating on
16 behalf of the Republican Party, it should have been particularly obvious to Ms. Novacek
17 given her experience. However, her statements and actions, discussed in greater detail
18 below, demonstrate that she intended both the contributors and a vendor making the calls to
19 believe that they were contributing to or working for the Republican Party or RNC.

20 To conduct the first set of calls, Ms. Novacek, through BPO, hired Apex CoVantage,
21 L.L.C. ("Apex") as a subcontractor to make fundraising calls on behalf of the RVC, and
22 either Apex or the RVC followed up the fundraising calls with mailings requesting the
23 promised contributions and donations. A few months after the program with Apex was

11044291239

1 terminated, Ms. Novacek began a second set of calls with a different vendor, Advantage
2 Direct Communications ("Advantage"). Advantage made similar solicitation calls, and the
3 contributions appear to have been collected only through credit card payments. In total, the
4 Apex and Advantage solicitations garnered approximately \$75,000 in contributions.

5 1. Apex Calls and Letters

6 In late 2003, Ms. Novacek contacted Tom Maddux, an individual who had recently
7 begun working at Apex but with whom Ms. Novacek had been professionally acquainted for
8 many years, and proposed that Apex become involved with political calling. Affidavit of
9 Tom Maddux dated October 20, 2006 ("Maddux Aff."), ¶¶ 3, 6-7. Apex had never done such
10 work in the past and Mr. Maddux was interested in obtaining new business for Apex, so he
11 agreed to work with Ms. Novacek. *Id.* Ms. Novacek provided Apex with a list of potential
12 contributors and a call script, and Apex utilized its call center based in India to conduct the
13 calls. Dep. at 113:15-114:2. The scripts were created and edited by Ms. Novacek. Dep. at
14 118:4-8. Each recipient who agreed to send a contribution then received a letter created and
15 mailed by Ms. Novacek providing additional information and instructing the recipient where
16 to send the contribution. Dep. Ex. 9 (RVC Letters). The contributions initially were sent
17 directly to a post office box held by Ms. Novacek, later some were sent to a second post
18 office box set up by Apex to hold the checks for Ms. Novacek. Maddux Aff. ¶ 14.

19 All of the Apex personnel with whom we spoke believed that the calls were being
20 made on behalf of the Republican Party and/or the RNC. This included Mr. Maddux; Mr.
21 Shashi Gupta, the president of Apex; Mr. Adam Booth, a person who assisted with training
22 Apex's employees at the call center in India; and Ms. Radhika Murari, a person charged to
23 assist with the program in Virginia. Maddux Aff., ¶¶ 9-10; Report of Investigation ("ROI")

11044291240

1 of Shashi Gupta, p. 1; ROI of Adam Booth, p. 2; ROI of Radhika Murari, pp. 2, 4-5. They
2 initially believed the program was for the RNC because of the name of the entity and the way
3 in which it had been presented by Ms. Novacek. For example, Ms. Novacek had told Mr.
4 Maddux that she was working for and was on retainer with the RNC and that she was in
5 charge of its outgoing telemarketing. Maddux Aff., ¶ 9.³ Therefore, when Ms. Novacek
6 proposed that Apex make calls on behalf of the RVC, Mr. Maddux assumed that the calls
7 were for the RNC. Maddux Aff., ¶ 9.

8 Other actions by Ms. Novacek led Mr. Maddux and the others at Apex to believe they
9 would be working for the Republican Party. For example, the Statement of Work attached to
10 the contract between Apex and BPO, signed by Ms. Novacek, described the program as
11 "Outbound Telemarketing Fundraising for the Republican Party" and discussed the revenue
12 split that will go to the "GOP" (ROI of Tom Maddux, p. 16; Dep. Ex. 14 (Attachment 1
13 Statement of Work #1 and Apex-BPO GOP Revenue Distribution Projections)). Furthermore,
14 when negotiating the contract between BPO, on behalf of the RVC, and Apex, Mr. Maddux
15 and the others at Apex asked Ms. Novacek why the entity was called the "Republican
16 Victory Committee" and not the RNC. Ms. Novacek explained that the RNC was an
17 "umbrella organization" and that the umbrella covered the calls proposed by Ms. Novacek.
18 Maddux Aff., ¶ 10; ROI of Shashi Gupta, p. 2. Having not been involved in political calling
19

³ At the time, Ms. Novacek was also working as a consultant for Advantage, and assisting Advantage in setting up two call centers in Nebraska by helping with training and other management issues. Affidavit of Jeff Butzke dated September 23, 2006, ¶¶ 2-4. Advantage was conducting fundraising calls for the RNC at that time. *Id.*, ¶¶ 3-4. However, Ms. Novacek was not on retainer or otherwise employed by the RNC. Affidavit of Trevor Person for the RNC dated October 26, 2006, ¶ 7; Complaint, p. 3.

11044291241

1 in the past, the Apex employees had no reason to doubt Ms. Novacek's explanation.⁴

2 In the RVC's telephone call solicitations, the callers were instructed to ask whether
3 the recipient was a registered Republican. Once that was verified, they asked for support for
4 "our state candidates and President Bush's agenda" because "[i]t's going to be tough to beat
5 the Democrats this fall." The caller explained, "Your financial help is critical so Republicans
6 can win...." Dep. Ex. 7 (RVC-Apex Script). The caller never stated that the RVC was not
7 affiliated with the Republican Party.

8 If a recipient expressed confusion during the call, the caller was directed to use a
9 series of "rebuttals," drafted by Ms. Novacek. Dep. Ex. 8 (RVC-Apex Rebuttals). The
10 rebuttals set forth answers to possible questions by call recipients, such as questions
11 regarding for what purpose the money would be used; questions asking who and what the
12 RVC was; or statements expressing unhappiness with President Bush or the war in Iraq.
13 However, only if the recipient of the call explicitly articulated some hesitation or confusion
14 related to the questions set forth above did the caller explain who or what the RVC was ("a
15 national group that supports state and local candidates"); indicate in even an indirect way that
16 the RVC was not affiliated with the Republican Party, the Republican National Committee or
17 President Bush (refer call recipients to Bush-Cheney campaign/RNC website or phone
18 numbers for Bush-Cheney campaign and/or RNC if requested); or indicate for what purpose
19 the donated money would be used ("your gift will go to help candidates who are in close
20 races and need help to put them over the top"). Dep. Ex. 8. Some of the rebuttals were

⁴ Other examples of Ms. Novacek's actions that led Apex employees to believe they were working for the official Republican Party and/or the RNC include a script proposed as part of that contract (but which may not have been used) that stated the callers were "calling for the Republican Party" (Dep. Ex. 14, Exhibit A1A); a memo drafted by Ms. Novacek to Adam Booth, which described the program as a "GOP committee" (Dep. Ex. 13); and Ms. Novacek's proposal to conduct calls (although it is unclear if these calls were made) to verify pledges that stated the recipient had recently received a call from "one of our agents ... with the Republican Party" (see RVC Verification Callback, March 2004).

1 drafted prior to Apex beginning the solicitation calls and some of the rebuttals were drafted
2 as a result of questions received when the calls were placed. Dep. at 140:18-141:25.
3 Regardless, the basic script itself was never changed to correct or minimize any
4 misimpressions.⁵

5 The calls were then followed up with letters and return envelopes. The letters
6 included the following statements, which either explicitly or implicitly referred to the
7 Republican Party:

8 • "Contributions or gifts to the *Republican Party* are not
9 deductible as charitable contributions."

10 • "I'm grateful *our Party* can count on your help to support
11 Republicans across the country win elections."

12 • "*The Republican Party* can count on my support to help
13 candidates at the state and local level. I'm proud to help *our*
14 *Party* prepare for the November election."

15 • "I am proud to help the *Republican Party* prepare for the
16 November election."

17 • "I'm grateful you are fully supportive of President Bush and
18 *our Republican Party*.... Please join me to ensure *our Party* is
19 ready to stand up to the liberal pundits."

20
21
22
23
24
25 Dep. Ex. 9 (RVC Letters) (emphasis added).

26 In addition, we obtained tape recordings of some of the calls made by Apex's affiliate
27 in India and it was clear that the callers stated, at least on occasion, that they were calling for
28 the Republican Party. For example, one call began, "Hello my name is Alicia and I'm
29 calling for the Republican Party." It thanked the recipient for his past support, discussed the

⁵ For example, in one "rebuttal" script drafted by Ms. Novacek, if the recipient of a call indicated his or her displeasure with President Bush, the caller was to state that the "money will not go to President Bush." Dep. Ex. 9. However, when call recipients requested official Bush-Cheney '04 or Republican Party paraphernalia or information, the "rebuttal" did not clarify the misimpressions as to who was calling, but merely directed the recipient to the actual Bush-Cheney '04 and RNC websites. *Id.*: Dep. at 141:4-25.

1 need to oppose Senator John Kerry and Democrats, and stated that the recipient's support
2 was necessary to "support our state candidates and President Bush." After the individual
3 agreed to make a contribution, he asked, "Now, this is the Republican Party?" to which the
4 caller responded, "yes." The caller further stated at the end of the call that the contribution
5 was not tax deductible.

6 Furthermore, the recipients of the calls believed that they were being asked to
7 contribute to the Republican Party or the RNC. We spoke with two sets of individuals:
8 (1) six individuals who received solicitation calls and made contributions to the RVC and
9 (2) four individuals who had received solicitation calls, but who did not make contributions.
10 The latter group consisted of individuals who had complained to the RNC, typically because
11 they believed the RNC was outsourcing calls to India and they disagreed with that practice.
12 Every member of both groups with whom we spoke believed that the calls were made on
13 behalf of the Republican Party or RNC. ROI of RVC Contributors; ROI of RNC
14 Complainants.

15 All who made contributions believed that they were giving to a sub-group of the RNC
16 or to a group similar to the National Republican Senatorial Committee, and all believed that
17 their money was going to be used toward the re-election of President Bush. ROI of RVC
18 Contributors, pp. 2-6; *see also* ROI of RNC Complainants, pp. 4, 7. The fact that many
19 people believed they were contributing to the Republican Party, the RNC and/or Bush-
20 Cheney '04 is reflected in the fact that nearly one hundred checks deposited by Ms. Novacek
21 were made payable to those organizations, or it was otherwise reflected in the memo line that
22 the money was intended for use by those entities. Ms. Novacek alternately claimed that any
23 check made payable to those entities was returned to the sender or that she deposited such

11044291244

1 checks by accident. Dep. at 144:12-20; 273:2-5; 84:3-6. Bank records show that none of
2 these checks were forwarded to or spent on behalf of the RNC or Bush-Cheney '04.

3 Bank records show that the RVC deposited \$50,292 as a result of the solicitations
4 made by Apex for the RVC. From the beginning, Ms. Novacek was in charge of collecting
5 incoming contributions at a post office box she set up. At some point, Ms. Novacek agreed
6 that Apex should begin collecting the contributions, so Apex set up a separate post office box
7 and began receiving contributions there, holding those funds for Ms. Novacek. Maddux Aff.,
8 ¶¶ 14-15. However, after Apex requested access to the bank statements to check the records
9 of contributions, Ms. Novacek broke off the agreement with Apex and refused any attempts
10 by Apex to contact her. *Id.*, ¶ 15; ROI of Tom Maddux, p. 5; ROI of Shashi Gupta, p. 3. As
11 a result, Apex has been holding an additional \$14,869 in contributions that were intended for
12 the RVC.

13 2. Advantage Solicitations

14 The RVC and Ms. Novacek then engaged in a second series of solicitation calls
15 utilizing a different contractor, Advantage, after the contract with Apex was terminated in
16 April 2004. Ms. Novacek had been a professional acquaintance of the president of
17 Advantage, Jeff Butzke, for many years. Affidavit of Jeff Butzke dated September 23, 2006
18 ("Butzke Aff."), ¶¶ 2-4. Mr. Butzke had extensive experience in professional political
19 calling and had known Ms. Novacek through that work. *Id.* As noted *supra*, he had hired
20 Ms. Novacek as a consultant to Advantage in 2003 to assist Advantage in setting up two call
21 centers in Nebraska and to help with training and other management issues. *Id.*, ¶ 4.

22 In October 2004, Ms. Novacek suggested to Mr. Butzke that Advantage engage in
23 political calling for the RVC. *Id.*, ¶ 5. She described the RVC as a 527 organization to Mr.

11044291245

1 Butzke. *Id.*; ROI of Jeff Butzke, pp. 8, 10-11. Mr. Butzke had extensive experience in
2 political calling and Advantage was already doing work for the RNC, which explains Mr.
3 Butzke's impression that the RVC was not affiliated with the Republican Party and also
4 explains why Ms. Novacek appears never to have attempted to convince Mr. Butzke
5 otherwise. Butzke Aff., ¶ 8. Instead, she simply used Advantage to conduct additional calls
6 for the RVC. Ms. Novacek approached Mr. Butzke to make these calls even though she had
7 already received a cease and desist letter from the RNC that indicated she should stop
8 holding the RVC out to the public as an official representative of the Republican Party. Dep.
9 at 236: 2-20. Even after receiving this RNC letter, she still failed to alter her call scripts to
10 clarify the RVC's status to call recipients.

11 According to Mr. Butzke, Advantage entered into an informal arrangement with
12 Ms. Novacek through BPO, and agreed to make calls on behalf of the RVC. Butzke Aff.,
13 ¶ 8. Ms. Novacek provided call lists and scripts; she claimed that the calls were to solicit
14 funds from people who had previously contributed to the RVC and therefore it appears likely
15 the contributors already believed that they were contributing again to the Republican Party,
16 RNC and/or Bush- Cheney '04. *Id.*, ¶ 5; Dep. Exs. 15, 18-19 (RVC-Advantage Script dated
17 October 2004; Emails from Judy Novacek to Jeff Butzke dated Oct. 11, 2004).

18 The script stated that the caller was calling on behalf of the Republican Victory
19 Committee and that the recipient of the call had "supported our Committee in the past." The
20 caller further explained that the

21 Presidential election is very close - which means our state and local candidate
22 races could be at risk. Everything hinges on getting Republicans to the polls
23 in two weeks. The Democrats are planning a massive Get-Out-The-Vote
24 effort in [INSERT STATE] and we need your help to counter this. Otherwise
25 the tax and spend liberals could win races from the White House to the state
26 house and local offices. It's crunch time and we need support to get every

11044291246

1 Republican to the polls. Help us defeat Democrats with an emergency gift of
2 \$[INSERT], to be used for Get-Out-The-Vote efforts.

3
4 Dep. Ex. 15.⁶

5
6 The callers also stated that, "Election Law requires we ask your Occupation
7 (sic) and your Employer (sic)" and informed the individual that "political
8 contributions are not tax deductible." Dep. Ex. 15 (RVC-Advantage Script). The
9 RVC received approximately \$10,063 in credit card transactions as a result of these
10 calls.⁷

11 3. Ms. Novacek's Explanation

12 In her deposition, Ms. Novacek asserted that she created the RVC because she had
13 decided to "create a better mousetrap," "where the vast majority of ... money that people
14 contributed was really going to help put conservative candidates in office at the state and
15 national level." Dep. at 60:2-12. Ms. Novacek claimed that the RVC was a political action
16 committee that focused on Republican-leaning conservative agendas. Dep. at 67:15-68:11.
17 Ms. Novacek also described the RVC as a "membership organization" and claimed that the
18 two phone solicitations asked people for membership fees to "join" the RVC. Dep. at 117:5-
19 9, 117:22-118:1. Ms. Novacek claimed that the RVC was created for the alleged purpose of
20 engaging in voter mobilization and get-out-the-vote activities. Dep. at 61:6-62:4. However,

⁶ Ms. Novacek claims that this script was never used, but that another script was used that asked people to vote Republican, while permitting people to make advance payments to the RVC for the following year's "membership fee." Dep. at 237:2-13. However, Mr. Butzke's recollection and the only RVC script in Advantage's possession rebut that claim. Butzke Aff., ¶ 9; ROI of Jeff Butzke, p. 5; Dep. Ex. 15.

⁷ Because the bank statements of the RVC and BPO only show transfers from credit card companies during this time period, it does not appear that any contributions were made by check; therefore, we were unable to contact any contributors regarding their solicitations. Dep. at 227:23-228:13. However, because the calls purportedly targeted individuals who had previously contributed to the RVC and because those who contributed to the RVC believed they were contributing to the Republican Party and/or the RNC, the Commission can infer that those who contributed based on the Advantage calls believed they were again asked to give money to the Republican Party and/or the RNC.

11044291247

1 contrary to Ms. Novacek's alleged plan of action for the RVC, she admitted that the only
2 activities ever engaged in by the RVC were the two sets of phone call solicitations made in
3 2004. Dep. at 289:14-21.

4 Ms. Novacek further claimed that she was entitled to state that the RVC was working
5 on behalf of the Republican Party because the Republican Party is a "broad based phrase
6 more than an actual entity" and that the "Republican Party" encompasses any entities that
7 have a conservative agenda and reflect traditional Republican values. Dep. at 23:1-8.
8 However, when asked to describe the Republican Party, she referred to the Republican
9 National Committee, the National Republican Senatorial Committee and various Republican
10 candidate committees; Ms. Novacek did not describe any entities similar to the RVC. Dep. at
11 21:16-22:9. More tellingly, when Ms. Novacek described the RVC to Mr. Butzke, who knew
12 that she was not working for the Republican Party, Ms. Novacek carefully changed her
13 language, described the RVC as a "527 organization" and never referred to any affiliation
14 with the "Republican Party." Butzke Aff., ¶ 5. In addition, Ms. Novacek's extensive
15 background in Republican politics, as well as her past experience working for official
16 Republican entities, demonstrates that she either knew or should have been aware that she
17 could not consider the RVC as part of the official Republican Party.

18 Furthermore, Ms. Novacek claimed that she repeatedly informed Mr. Maddux and
19 others at Apex, the first vendor, that the RVC was not the RNC and implied that any other
20 impression was a misunderstanding on their part. Dep. at 170:18-23, 171:2-9; 171:23-172:3.
21 She claimed that she corrected employees at Apex when they referred to the program as the
22 RNC and that the documents relating to the RVC all called it the "Republican Victory
23 Committee." Dep. at 173:19-174:16; 174:17-175:4. However, everyone at Apex with whom

11044291248

11044291249

1 we spoke says the opposite, and email records demonstrate that Ms. Novacek was aware that
2 individuals at Apex considered the program part of the RNC and she failed in her response
3 emails to correct them. See Email from Jody Novacek to Tom Maddux dated January 5,
4 2004 and response dated January 6, 2004, and Email from Jody Novacek to Adam Booth
5 dated March 2, 2004 (Ms. Novacek referred to different aspects of the program in terms of
6 the "RNC Finale -- New Performance Grid and the Narrative Worksheet" and the "RNC-
7 Backend Report"); see also Dep. at 198:17-25 (if anyone referred to the program as the
8 GOP, Ms. Novacek admits that she may not have corrected them); Dep. at 199:21-200:10 (if
9 she received an email that stated the RVC program was part of the RNC, Ms. Novacek
10 admits that she might not have corrected it).⁸

11 Ms. Novacek also argued that there is "confusion in the marketplace" regarding the
12 different political entities soliciting funds from the general public, and asserted that she did
13 not create such confusion. Dep. at 145:6-9.⁹ However, she seems to have taken advantage of
14 the confusion existing among potential donors in the course of the RVC's fundraising efforts.
15 Ms. Novacek never addressed that "confusion" when preparing her solicitations and, in fact,
16 took affirmative steps to exploit the existing confusion. For example, she admits that she
17 drafted certain rebuttals after receiving feedback from callers, including adding rebuttals that

⁸ Q: When [Apex] describe[d] the program [in the contract and training manual] as an outbound telemarketing fundraising for the Republican Party, do you recall ever telling them that's not necessarily accurate or explaining to them what the RVC was?

A: Well, the Republican Party encompasses many different groups. So I may not have specifically pointed that out. I may have just left it as a general statement. Dep. at 191:25-192:8. Ms. Novacek also repeatedly referred to the RVC as a "client," which would have lead the Apex employees to believe more easily that the work was for a third-party such as the RNC, rather than an entity controlled by her. Dep. at 188:8-8; 197-198; ROI of Radhika Murari, pp. 3-4; see Email from Jody Novacek to Radhika Murari dated March 24, 2004.

⁹ Q: So you knew when you were starting these calls [with Apex] that there could have been some confusion as to who was calling?

A: That -- that environment is out there for every Republican entity that calls.
Dep. at 173:6-10.

1 addressed questions about the Bush-Cheney campaign, requests for a Bush-Cheney bumper
2 sticker and requests for information about Republican state party committees. Dep. at 141:2-
3 25; Dep. Ex. 8 (RVC Rebuttals). Yet, even after being made aware that her call scripts
4 caused people to believe they were speaking with the Bush-Cheney '04 committee or the
5 RNC, Ms. Novacek did not alter the call scripts to end any such confusion. Indeed, based on
6 interviews with some of the contributors, it appears the primary reason they sent money to
7 the RVC was because they were confused as to its true identity.

8 Ms. Novacek also admitted that the two phone solicitations raised at least \$50,000 for
9 the alleged purpose of supporting candidates in federal and state elections. Dep. at 60:9-12,
10 207:23-208:5. Bank records and other information indicate that the solicitations resulted in
11 approximately \$75,000 in contributions in 2004. However, no money received by the RVC
12 was ever given to any candidate or political committee. Dep. at 266:13-267:1. Indeed, based
13 on bank records, it is clear that any contributions initially deposited into the RVC's accounts
14 were disbursed to Apex or Advantage; disbursed to Ms. Novacek directly; or transferred to
15 the BPO account. That BPO account also received incoming money from other entities,
16 likely other business ventures engaged in by Ms. Novacek, and Ms. Novacek paid Apex and
17 Advantage through the BPO account. Ms. Novacek also appears to have made a large
18 number of payments for personal living expenses from the BPO account. Although
19 Ms. Novacek claimed that any checks written to her from the accounts were for RVC
20 expenses, Dep. at 269:11-17, it is unclear whether the RVC had many, if any, expenses other
21 than its telemarketing expenses.

III. LEGAL ANALYSIS

A. Fraudulent Misrepresentation

Under section 441h(b) of the Act, a person cannot fraudulently misrepresent herself as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations and a person cannot "willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to" engage in any of the misrepresentations described above. See 2 U.S.C. § 441h(b); see also 11 C.F.R. § 110.16. To violate section 441h, the Act requires that the violator had the intent to deceive, but does not require that the violator sustain all elements of common law fraud. See MUR 3690; MUR 3700.¹⁰ Even absent an express misrepresentation, a scheme devised with the intent to defraud is still a fraud if it was reasonably calculated to deceive persons of ordinary prudence and comprehension. See *United States v. Turner*, 377 F.3d 232, 242 (2d Cir. 2004), citing *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954).

Based on the available evidence set forth above, the RVC and Ms. Novacek violated section 441h(b)(1) by making phone calls, mailing letters and entering into agreements for the purpose of soliciting contributions while intentionally misrepresenting that they were acting under the authority of the Republican Party. Furthermore, that evidence demonstrates that Ms. Novacek knew that she could not claim that the RVC was operating on behalf of or

¹⁰ As will be discussed in greater detail, the RVC did not place a sufficient disclaimer on its mailing. See *infra*, section III.B. In the past, the Commission has held on occasion that the presence of a disclaimer stating the person and/or entity that paid for and authorized a communication negates intent. See MUR 2205; MUR 3690; MUR 3700. However, in MUR 5089, the Commission more recently rejected the notion that such a disclaimer automatically negates intent and found reason to believe that a committee violated section 441h even with the presence of a disclaimer. See also Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg. 76,969 (Dec. 31, 2002).

11044291251

1 soliciting money for the Republican Party, and therefore the violations of the Act appear to
2 have been knowing and willful.¹¹

3 Ms. Novacek's actions and statements to others demonstrate her intent to deceive any
4 potential donors and Apex and, furthermore, were deliberately calculated to leave a
5 misimpression that the RVC was soliciting money for the Republican Party or RNC, thereby
6 taking advantage of an already existing confusion. It appears that the confusion may have
7 already existed among the general public as to the extent of the applicability of the
8 Republican party label. However, Ms. Novacek's actions were focused on exploiting the
9 confusion as it specifically related to the potential RVC donors. Ms. Novacek admitted
10 drafting the scripts and follow-up letters and hiring Apex and Advantage to make the phone
11 call solicitations at issue here. Dep. at 118:4-8; 182:18-19. As described above, the scripts
12 and letters repeatedly referred to "the Republican Party," "our party," and the like. The
13 follow-up letters in particular referred five times to the Republican Party, including in a
14 statement - "contributions to the Republican Party are not tax-deductible." (emphasis added).

15 Furthermore, Ms. Novacek repeatedly described the RVC as part of the Republican
16 Party and/or the GOP, in documents such as the contractual arrangement with Apex. See,
17 e.g., Dep. Ex. 14 (Attachment 1 Statement of Work #1); see also Dep. Ex. 13 (Memo from
18 Jody Novacek to Adam Booth dated January 14, 2004). Indeed, she appears to have

¹¹ The phrase "knowing and willful" indicates that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976); see also *Federal Election Comm'n v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and "knowing and willful"). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge" that an action was unlawful. *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). In *Hopkins*, the court found that an inference of a knowing and willful violation could be drawn "from the defendants' elaborate scheme for disguising their ... political contributions...." *Id.* at 214-15. The court also found that the evidence did not have to show that a defendant "had specific knowledge of the regulations" or "conclusively demonstrate" a defendant's state of mind, "if there were 'facts and circumstances from which the jury reasonably could infer that [the defendant] knew her conduct was unauthorized and illegal.'" *Id.* at 213 (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir.) cert. denied, 439 U.S. 838 (1989)).

1 intentionally deceived Apex and its employees into believing they were working on behalf of
2 the Republican Party; she told them that the RNC encompassed the RVC, and she does not
3 appear to have corrected them when they referred to the RVC as the Republican Party.
4 These statements and omissions on her part have been intended to, and certainly had the
5 effect of, creating an environment in which Apex employees could and would answer "yes"
6 when recipients asked, as at least one did, whether it was the Republican Party that was
7 calling. Ms. Novacek also admitted that she knew those receiving the calls were confused as
8 to the entity calling because many recipients asked for information for the RNC or Bush-
9 Cheney '04. However, she failed to correct those misimpressions or rewrite the call scripts
10 in a way to alleviate the confusion.

11 Moreover, although reliance on the misrepresentation is not necessary to prove a
12 violation of section 441h (*see* Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg.
13 76,969 (Dec. 31, 2002); *Neder v. United States*, 527 U.S. 1, 24-25 (1999)), every individual
14 with whom we spoke at Apex and any individual who received a solicitation call with whom
15 we spoke believed that the RVC was representing and/or working on behalf of the
16 Republican Party or the RNC and was asking for contributions to help reelect President
17 Bush, and many contributors wrote checks payable to the Republican Party or other official
18 Republican organizations. Ms. Novacek successfully created a false impression and
19 exploited the confusion.

20 In her testimony, Ms. Novacek attempted to leave the impression that she had a good
21 faith belief that she could use the name "Republican Party" in the manner she did because the
22 "Republican Party" is a "broad based phrase" that effectively encompassed all persons and
23 organizations espousing Republican principles. But to the extent she claims such a good

11044291253

1 faith belief, we do not believe that claim is credible. For example, when asked to describe
2 the "Republican Party," Ms. Novacek named only official Republican entities such as the
3 RNC, the "Republican Senatorial Committee" (sic), and a "congressional committee." In
4 addition, her years of experience in conducting fundraising for actual official Republican
5 organizations shows that she could not, in good faith, have believed that her organization was
6 truly part of the official "Republican Party." Furthermore, despite being served with a cease
7 and desist letter from the RNC, Ms. Novacek continued to run her program with Advantage,
8 although she was more careful not to explicitly state, but rather only imply, to potential
9 contributors that she was working with the Republican Party. Additionally, the contrast
10 between her statements and conduct towards Apex, whose personnel had no reason to doubt
11 that RVC was a project of the RNC or the Republican Party, and her statements and conduct
12 towards Advantage, where Mr. Butzke knew better, belie any claim by Ms. Novacek that she
13 thought she could freely represent herself as "the Republican Party." For example, Ms.
14 Novacek, in her dealings with Apex, made repeated references to the RNC/Republican Party
15 in conversations and emails to employees of Apex, while she made no references, either
16 directly or indirectly, in her dealings with Advantage through Mr. Butzke to suggest or imply
17 a connection to the Republican Party or the RNC.

18 Finally, Ms. Novacek claims that, in effect, she intended, in good faith, for the RVC
19 to become a real political organization that would be a "better mousetrap" for political
20 fundraising. As an initial matter, even if she had every good faith intention for the RVC to
21 be a "real" political committee, fundraising for it by fraudulently misrepresenting it to be the
22 Republican Party would still violate section 441h(b) since the RVC's calls were designed to
23 deceive the recipients into believing the calls were on behalf of the Republican Party or the

11044291254

1 RNC. Moreover, we do not believe that claim is credible. The RVC never made any
2 contributions to any candidate or any other political entity, and no other political activities
3 were undertaken by the RVC. In addition, contributions specifically earmarked for entities
4 such as the RNC or Bush-Cheney '04 were never forwarded to those entities. Even after
5 payments to Apex and Advantage (which constituted the majority of the RVC's
6 disbursements), most of the remaining funds went either to Ms. Novacek or to her other alter
7 ego, BPO; the BPO funds, in turn, were commingled with funds from other entities and were
8 used by her to pay personal expenses.

9 For all of these reasons, we are prepared to recommend that there is probable cause to
10 believe that RVC and Ms. Novacek, in both her official capacity as treasurer and personal
11 capacities, knowingly and willfully violated 2 U.S.C. § 441h(b)(1) by misrepresenting the
12 RVC as acting on behalf of the Republican Party. Similarly, because the BPO entities
13 entered into contracts on behalf of the RVC to make the solicitation calls in question, there is
14 probable cause to believe that the BPO entities knowingly and willfully violated 2 U.S.C.
15 § 441h(b)(2) by participating in or conspiring to participate in a scheme or plan to
16 fraudulently misrepresent the RVC as representing the Republican Party.

17 **B. Disclaimer**

18 Any public communication by any person that solicits any contribution must contain
19 a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a). A public communication, for this
20 purpose, includes any communication by mailing or phone bank. 11 C.F.R. § 100.26. A
21 "telephone bank" means more than 500 telephone calls of an identical or substantially similar
22 nature within a 30-day period. 11 C.F.R. § 100.28. "Substantially similar" means
23 communications that include substantially the same template or language. *Id.* If the

11044291255

1 communication is not authorized by a candidate, a candidate's authorized political committee
2 or any agent, the disclaimers must state the name and street address, telephone number or
3 World Wide Web address of the person who paid for the communication and state that the
4 communication is not authorized by any candidate or candidate's committee. 2 U.S.C.
5 § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). The disclaimer must be presented in a clear and
6 conspicuous manner, be of sufficient type size to be clearly readable, and be contained in a
7 printed box set apart from the other content of the communication. 2 U.S.C. § 441d(c);
8 11 C.F.R. §§ 110.11(c)(1), 110.11(c)(2)(i)-(ii).

9 Based on the number and amount of contributions, the RVC made more than 500
10 phone calls of an identical or substantially similar nature within a 30-day period.

11 Nonetheless, although the calls and the follow-up letters stated that they were made (in the
12 case of the calls) or paid for (in the case of the letters) by the "Republican Victory
13 Committee," it is undisputed that the call script did not contain a sufficient disclaimer as to
14 who paid for or authorized the calls despite the fact that they were direct solicitations for
15 donations, and the disclaimer on the letter was not in a box and did not contain the street
16 address, telephone number or World Wide Web address of the RVC.

17 Furthermore, Ms. Novack admitted that she knew she needed to use a disclaimer on
18 the calls and mailers because of her prior political work. Dep. at 137:2-5. She claimed that
19 she thought her disclaimer was "in compliance," but also admitted that, despite her repeated
20 references to election law in correspondence with Apex and Advantage and in the
21 solicitations made by Advantage, she never read the Act or Commission regulations. Dep. at
22 136:22-24.

11044291256

Accordingly, we are prepared to recommend that the Commission find probable cause to believe that the RVC and Ms. Novacek, in her official capacity as treasurer, violated 2 U.S.C. § 441d(a).

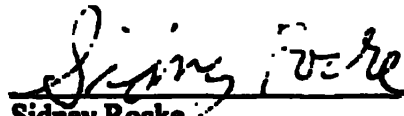
V. RECOMMENDATIONS

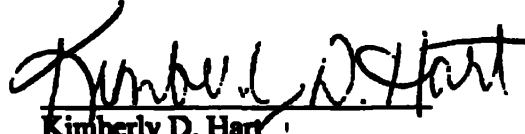
1. Find probable cause to believe that the Republican Victory Committee, Inc. a/k/a Republican Victory 2004 Committee and Jody Novacek, in her official capacity as treasurer and personal capacities, knowingly and willfully violated 2 U.S.C. § 441h(b)(1);
2. Find probable cause to believe that the Republican Victory Committee, Inc. a/k/a Republican Victory 2004 Committee and Jody Novacek, in her official capacity as treasurer, violated 2 U.S.C. § 441d(a); and
3. Find probable cause to believe that BPO, Inc. and BPO Advantage LP knowingly and willfully violated 2 U.S.C. § 441h(b)(2).

June 19, 2007
Date


Thomasenia P. Duncan
General Counsel


Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement


Sidney Rocke
Assistant General Counsel


Kimberly D. Hart
Attorney

11044291257